



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Brussels Steel America, Inc.
File: B-225556; B-225588; B-225629
Date: April 16, 1987

DIGEST

1. The General Accounting Office generally will not disturb a contracting officer's nonresponsibility determination absent a showing of bad faith or a lack of any reasonable basis for the determination.
2. Where contracting officer's negative responsibility determination is based on a formal preaward survey concerning an item similar to that being procured and on an informal -- preaward survey--and reports on both were issued less than 2 months before the nonresponsibility determination--information regarding performance capability is as current as feasible, as required by the Federal Acquisition Regulation, 48 C.F.R. § 9.105-1(b)(3).

DECISION

This decision involves three protests against allegedly improper determinations of nonresponsibility by the Defense Logistics Agency (DLA) with respect to three procurements for supplying steel. In each, Brussels Steel America, Inc. objects to the rejection of its low bid and contends that the nonresponsibility determination was without any reasonable basis.

We deny the protests.

The first protest concerns the rejection of Brussels' bid under invitation for bids (IFB) No. DLA500-86-B-2338, issued July 18, 1986, by the DLA's Defense Industrial Supply Center (DISC), Philadelphia, Pennsylvania, for a supply of high tensile steel plate. The agency opened bids on August 18 and, on November 7, decided to reject Brussels' low bid because of the firm's "severe delinquency problems." On November 26, the agency awarded a contract to C&C Supply Co., Inc.

038666

The second protest concerns IFB No. DLA500-86-B-2349, issued July 21 by DISC for carbon steel plate. The agency opened bids on August 20 and, on November 20, rejected Brussels' low bid on contract line item 0001. On December 1, the agency awarded a contract for this item to Huntington Forge, Inc.

The third protest involves IFB No. DLA500-86-B-2449, issued September 26 by DISC and also for carbon steel plate. The agency opened bids October 27. Although Brussels submitted the low bid on contract line items 0001 through 0004 and 0006, DISC again rejected the bid after the contracting officer, on November 13, determined the firm nonresponsive. On December 1, the agency made award to Pines Steel Supply Corporation, the low bidder on item 0005 and, according to the agency, the low, responsive, responsible bidder on the other items.

In each of these procurements, the contracting officer^{1/} relied on a formal preaward survey, made in connection with a procurement for similar steel products, dated September 23; the report of this survey reflected a delinquency rate on open contracts and purchase orders of 48.3 percent. In two of the procurements, the contracting officers also cited an informal preaward survey dated October 10 that reflected a delinquency rate of 35.6 percent on open contract line items. The contracting officers also considered an internal, computerized contractor performance analysis which, as of October 28, 1986, indicated a delinquency rate on open contracts of 40 percent.

Brussels essentially argues that it was found to be nonresponsive because of a history of performance deficiencies that allegedly had been cured to within the 15 percent delinquency rate that DISC considers acceptable.^{2/} Therefore, the protester contends that the agency made its

^{1/} The same contracting officer made the nonresponsibility determination for IFB Nos. -2338 and -2349; a different contracting officer made the determination for the third IFB, No. -2449.

^{2/} In connection with a General Accounting Office (GAO) report on DISC's procedures for making nonresponsibility determinations, DLA officials stated that a 10-percent delinquency was acceptable, 20 percent was unacceptable, and 11-19 percent dictated further analysis. GAO, Analyses of DLA's Dealings with the Pines Corporation during 1985. NSIAD-86-198, B-222991, Sept. 1985. Brussels cites this report in its protest.

nonresponsibility determinations without considering current information, as required by the Federal Acquisition Regulation (FAR), 48 C.F.R. § 9.105-1(b)(3) (1986). Specifically, Brussels contends that as of October 1, it had completed more than 560 contract line items and reduced its delinquency rate to 14 percent. Brussels points out that the section of the preaward survey containing the delinquency information is dated September 9, 1986, nearly 2 months before the initial determination of nonresponsibility.

Brussels further argues that flaws in the program logic used to determine delinquencies have in the past resulted in line items being listed as overdue which were actually delivered within contract requirements. Brussels states that in September 1986, a DISC notice stating that the firm was being placed on a "Contractor Review List" recognized that it had reduced its delinquency rate to 23.4 percent. Moreover, the protester states, in early December, it was orally advised by a DISC representative that it had been successful in reducing its delinquency rate to well below the 15 percent threshold.

Brussels cites True Machine Co., B-215885, Jan. 4, 1985, 85-1 CPD ¶ 18, for the proposition that agencies may establish internal policies or procedures, the meeting of which is tantamount to an affirmative determination of responsibility. Brussels contends that since it met or exceeded the standard established by DISC, it should not have been determined nonresponsible.

The determination of a prospective contractor's responsibility rests within the broad discretion of the contracting officer, who in making that decision must of necessity rely primarily on his or her business judgment. Venusa, Ltd., B-217431 et al., Apr. 22, 1985, 85-1 CPD ¶ 458. While the determination should be based on fact and reached in good faith, it ultimately should be left to the discretion of the contracting agency, which must bear the brunt of any difficulties during performance. Urban Masonry Corp., B-213196, Jan. 3, 1984, 84-1 CPD ¶ 48 at 4, 5. The contracting officer also has broad discretion as to whether a preaward survey should be conducted and, if conducted, the degree of reliance to be placed on the results. Newport Offshore, Ltd., B-219031 et al., June 13, 1985, 85-1 CPD ¶ 683. Because of this broad discretion, our Office generally will not question a negative determination of responsibility unless the protester can demonstrate that the agency acted in bad faith or lacked a reasonable basis for the determination. Pauline James & Associates, B-220152 et al., Nov. 20, 1985, 85-2 CPD ¶ 573.

Since Brussels has not alleged bad faith, the only question for our review is whether the determinations that Brussels was nonresponsible were reasonable, based on the information available at the time the determinations were made. See Firm Reis GmbH, B-224544, et al., Jan. 20, 1987, 87-1 CPD ¶ 100; Decker and Co. et al., B-220807 et al., Jan. 28, 1986, 86-1 CPD ¶ 100 at 5. In this regard, the FAR provides that a prospective contractor that recently has been seriously deficient in contract performance must be presumed to be nonresponsible unless the contracting officer determines that the circumstances were beyond the contractor's control or that the contractor has taken appropriate corrective action. See 48 C.F.R. § 9.104-3(c). No such determinations were made here.

The preaward survey of September 23, 1986, showed that 185 of the 383 existing Brussels' contracts and purchase orders were in late delivery or "delinquent" status. This was a delinquency rate of 48.3 percent. The principal causes of delay were identified as follows: 20 percent were considered the government's responsibility (10 percent due to unavailability of United States flag vessels and 10 percent to late acceptance of supplies at destination), 80 percent were considered the contractor's responsibility (30 percent due to delays incident to accumulating truckload quantities for economical shipment, 10 percent to a deficient subcontractor monitoring system, 10 percent to problems in making of steel, and 30 percent to poor planning to meet delivery schedules). With respect to 267 completed contracts, the survey showed that 171 had been completed late, for a delinquency rate of 64 percent. Only 15 percent of the delays were considered the government's responsibility.

Even if, as Brussels urges, we eliminate those delinquencies for which the government was responsible and those due to delays for accumulation of truckload quantities, a practice that Brussels states it no longer follows, Brussels still must be considered responsible for the majority of the delays. DLA has submitted documentation which supports its position that Brussels was substantially delinquent. On the other hand, although Brussels states that it had reduced its delinquency rate to 14 percent, it has provided no evidence, for example, specific completed contract or contract line item numbers and dates of completion, to support this position.

Where a contractor disputes an agency's determination of nonresponsibility, we will not disturb that determination if it is based on what the agency reasonably perceives as the

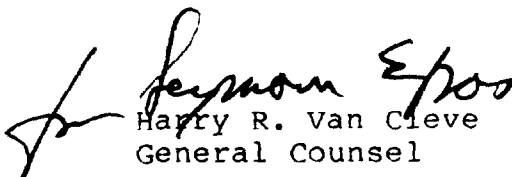
contractor's prior inadequate performance. Howard Electric Co., 58 Comp. Gen. 303 (1979), 79-1 CPD ¶ 137. We find that the determination that Brussels was not a responsible contractor with regard to all three procurements, based on its poor performance record, to be reasonable.

We do not believe that the FAR requirement that responsibility determinations be made on "as current a basis as is feasible," 48 C.F.R. § 9.105-1(b)(3), requires updating when, as here, the determinations are made within 1 to 2 months after issuance of the preaward survey reports on which they are based. In this case, the informal preaward survey, updating the formal one for essentially the same item, was made on October 10, and the nonresponsibility determinations were made between November 7 and November 20.

Finally, the parties have submitted additional information, purporting to show that after the determinations, the protester's performance either improved further or continued to be delinquent. We do not consider this information relevant. The contracting officers were entitled to make their determinations on the basis of the facts at hand immediately before the award dates, and they are not affected by any changes that may have occurred after those dates. See Camel Manufacturing Co.--Request for Reconsideration, B-218473.4, Sept. 24, 1985, 85-2 CPD ¶ 327. --

In view of these findings, we need not reach the question of the agency's allegedly improper consideration of the protester's failure to comply with requirements for shipping on United States flag vessels, since the delinquencies alone provide a proper basis for the nonresponsibility determinations. In addition, under IFB No. -2349, Brussels protested an award to Lukens Steel Company for contract line item 0002; however, since Brussels was not the low bidder for this item, and the agency found Lukens both responsive and responsible, we need not consider this basis of protest.

The protests are denied.


Harry R. Van Cleave
General Counsel